

## 48A C.J.S. Judges § 28

Corpus Juris Secundum | August 2023 Update

### Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

### II. Selection, Eligibility, and Qualification

#### A. Selection

#### 2. Manner or Method of Selection

#### b. Appointment

#### (1) In General

## § 28. Generally

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### West's Key Number Digest

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**The power to appoint judges may or may not reside in the governor, depending upon applicable law.**

Generally, a state may provide for the appointment of state judges without violating any provisions of the Federal Constitution.<sup>1</sup> Additionally, the power to appoint judges may properly reside in the governor.<sup>2</sup> The power of the governor to appoint a member of the judiciary must, however, be expressly provided for in the constitution,<sup>3</sup> and must be exercised in accordance with the constitution,<sup>4</sup> and with statutes implementing the constitutional provisions.<sup>5</sup> A prohibition against considering political affiliation in appointing public employees does not, generally, include gubernatorial appointments to the judiciary.<sup>6</sup>

Where provided, a governor may be given the power to nominate individuals for judgeships while their actual appointment is in the hands of the legislature.<sup>7</sup> In other jurisdictions, however, although the legislature possesses the power to create judgeships, it has no authority to appoint judges to fill those positions.<sup>8</sup> In still other jurisdictions, a gubernatorial appointment for a judicial office is effective only when confirmed by a commission.<sup>9</sup> Where the creation of new judgeships is mandated by a change in the census, such judgeships are, in some jurisdictions, filled by appointment by the governor.<sup>10</sup>

In jurisdictions in which the governor is given the power to appoint a judge, it is sometimes required that such appointment be made with the concurrence of the senate<sup>11</sup> and exercised only when the legislature is in session.<sup>12</sup> If the constitution requires that

the appointment be by the governor with the consent of the senate, the legislature cannot provide otherwise.<sup>13</sup> While, generally, an appointment without the required concurrence does not confer a right to the office,<sup>14</sup> in some instances, concurrence is not required.<sup>15</sup>

***Federal judges.***

All federal judges must be appointed by the president, by and with the advice of the senate.<sup>16</sup>

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Footnotes

- 1 U.S.—*Holley v. Askew*, 583 F.2d 728 (5th Cir. 1978); *Marshall v. Price*, 6 Fed. Appx. 788 (10th Cir. 2001).
  - 2 La.—*Sciambra v. Edwards*, 270 So. 2d 167 (La. Ct. App. 1st Cir. 1972).
  - 3 Minn.—*State ex rel. La Jesse v. Meisinger*, 258 Minn. 297, 103 N.W.2d 864 (1960).
  - 4 Mass.—*Opinion of the Justices to the Council*, 368 Mass. 866, 334 N.E.2d 604 (1975).
  - 5 Alaska—*Delahay v. State*, 476 P.2d 908 (Alaska 1970).
  - 6 U.S.—*Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993).
  - 7 N.H.—*Opinion of the Justices*, 117 N.H. 398, 374 A.2d 638 (1977).
  - 8 Mass.—*Opinion of the Justices*, 370 Mass. 886, 352 N.E.2d 673 (1976).
  - 9 Cal.—*In re Governorship*, 26 Cal. 3d 110, 160 Cal. Rptr. 760, 603 P.2d 1357 (1979).
  - 10 Fla.—*State ex rel. Roundtree v. Johnson*, 247 So. 2d 54 (Fla. 1971).
  - 11 Del.—*In re Asbestos Litigation*, 623 A.2d 546 (Del. Super. Ct. 1992).
  - 12 Fla.—*State ex rel. Wynn v. Squarcia*, 66 So. 2d 263 (Fla. 1953).
  - 13 N.J.—*State ex rel. Schalk v. Wrightson*, 58 N.J.L. 50, 32 A. 820 (N.J. Sup. Ct. 1895).
  - 14 Fla.—*State ex rel. Landis v. Bird*, 120 Fla. 780, 163 So. 248 (1935).
  - 15 Fla.—*State ex rel. Landis v. Bird*, 120 Fla. 780, 163 So. 248 (1935).
- Requirement unconstitutional as violative of separation of powers**  
 Utah—*Matheson v. Ferry*, 641 P.2d 674 (Utah 1982).
- 16 Va.—*Thomson v. Robb*, 229 Va. 233, 328 S.E.2d 136 (1985).